No. 52511-9-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of:

JACOB IVAN SCHMITT,

PETITIONER.

PERSONAL RESTRAINT PETITION

REPLY BRIEF

Pierce County Superior Court Cause No. 13-1-04668-9
The Honorable John R. Hickman

Jacob Ivan Schmitt #711473
Monroe Correctional Complex - TRU
16774 - 170th Dr. SE/P.O. Box 888
Monroe, WA 98272

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A. CLARIFICATION OF FACTS & PROCEDURAL HISTORY

1. Facts:

Clarification About Mr. Schmitt's Challenge at Sentencing.

Mr. Schmitt asks that this Court please note that the state drafted all of the plea and sentencing documents in this case. Both the Stipulation on Prior Record and Offender Score, and the Judgment and Sentence listed Mr. Schmitt's 2001 federal conviction for bank robbery as a class C felony. Ex. C at 2; Ex. E at 2 (All Exhibits cited herein are from the Opening Brief unless otherwise noted). The Stipulation shows the federal offense as 1 point toward Mr. Schmitt's offender score. Id. at 2.

When Mr. Schmitt reviewed the plea and sentencing documents with Mr. Curtis Huff (trial counsel) on September 10, 2014, Mr. Schmitt informed Mr. Huff that he would not stipulate that the federal offense was a felony. Ex. F at ¶ 8. Mr. Schmitt also directed a language change to the Findings of Fact and the Conclusions of Law. Ex. P (Reply Brief[1]).

At the subsequent plea and sentencing hearing on September 14, 2014, Mr. Huff explained to the trial court that, because the federal offense was not comparable to a Washington crime, the state was attempting to apply the scoring directive in RCW 9.94A.525(3) to the federal offense. Ex. B at 7, lines 1-9.

[1] Mr. Schmitt has filed a Motion to Supplement PRP Exhibits with documents secured through the Public Records Act. They are Exhibits N, O, and P. Mr. Schmitt has attached those Exhibits to this Reply Brief for ease of review. By doing so Mr. Schmitt does not mean any disrespect to this Court.

During the hearing on September 12, 2014, Mr. Huff several times argued that because the federal offense was not comparable to a Washington felony it, therefore could not be included in Mr. Schmitt's offender score.

Mr. Huff: "[A] federal bank robbery conviction **is not comparable** for the purposes of comparing it to Washington Law, **therefore**, it should not be counted."

Ex. B at 6, lines 22-25 (emphasis added).

Mr. Huff: "[I]t is Mr. Schmitt's position and my position that if [the federal offense] is not comparable, **it is not comparable** for any purposes, as far as the **felony** is concerned."

Id. at 7, lines 10-13 (emphasis added).

The state then argued to the trial court -- and invited Mr. Huff to stipulate -- that if a factual comparability analysis were performed, the federal offense would be classified as a class A felony. Id. at 16, lines 7-13.

Mr. Huff rejected the state's position on factual comparability, and after summarizing Lavery, informed the court that Mr. Schmitt was arguing that the federal offense is

> "[N]ot **comparable to any state felony**, and **therefore**, should not count. That's his position and our position."

Id. at 17, lines 12-14 (emphasis added).

The court responded in the very next line of the VRP:

> "**That's going to be my ruling.** I think that the language of [State v.] Thomas [___ Wn. App. ___, 144 P.3d 1178 (2006)] couldn't be any clearer in terms of specifically finding that [federal bank robbery] **was not comparable** to a Washington crime. They obviously had under their consideration RCW 9.94A.525(3) since it does talk about comparable offenses, and they made an

analysis and found that it wasn't comparable."

Id. at 17, lines 15-21 (emphasis added).

Clarification About the Scope of the Trial Court Ruling.

The Response seeks to bifurcate classification and scoring in an attempt to mislead this Court into finding that the trial court only made a ruling on scoring. The Response states that "the sentencing court ruled,'...I will exclude the federal offense as an offender score...'", citing to the VRP at 17. Response at 2, lines 21-22. As Schmitt established above, Mr. Huff argued multiple times that the federal offense was not "comparable" to any state "felony," and the trial court responded, "That's going to be my ruling." Ex. B at 17, lines 11-17.

The trial court went on to tell Mr. Schmitt: "Sir, I am granting your counsel's motion to exclude the federal offense as **a prior conviction**[.]" Id. at 18, lines 3-4 (emphasis added). The trial court had the federal offense stricken from the judgment and sentence, with the notation: "C[our]t [d]etermines not comparable or included in prior conviction - offender score." Ex. C at 2. This Court in State v. Schmitt, 196 Wn. App. 739, 385 P.3d 202 (2016) (hereinafter "Schmitt. 1" due to other appellate proceedings) states under "FACTS" that the trial court determined that "there was **no comparable Washington offense** for the federal bank robbery charge." Id. at 741-742 (emphasis added).

The state impermissibly asks this Court to accept that the trial court only made a determination about Mr. Schmitt's

offender score calculation -- when the record is unequivocally clear that the trial court made a ruling that the federal offense was neither comparable to a felony, nor a prior conviction.

Clarification about Mr. Schmitt's Colloquy with the Trial Court.

At the time of plea and sentencing the trial court asked Mr. Schmitt if it was his "intent to enter this plea no matter what the decision the Court makes in regard to the offender score." To which Mr. Schmitt replied: "Yes, sir, it is." Ex. B at 11-12.

Without making clear how this exchange undermines Mr. Schmitt's position in these proceedings, the state points to it in every brief they file. Even so, Mr. Schmitt can explain his response to the trial court's question: He was abiding by the plea agreement. The plea agreement provided that the state would submit their version of Mr. Schmitt's criminal history, and if Mr. Schmitt disagreed, he would submit his own version. Ex. D at 3, § 6(c). This provision goes on to provide that any dispute would be resolved by the sentencing court. Id.

When Mr. Schmitt answered the trial court's question affirmatively, it was because Mr. Schmitt was abiding by the terms of the plea agreement. It did not mean -- as the state seems to argue -- that the issue of his criminal history or offender score was not an important part of the plea proceedings to Mr. Schmitt.

In fact, the state's Response in State v. Schmitt (No. 54341-2-II) admits that the issue of how Mr. Schmitt's federal offense

would be treated at sentencing mattered so much to him that the language in § 6(c) "was added to the Statement of Defendant on Plea of Guilty." Response at page 4 (State v Schmitt, No. 54341-2-II).

2. Procedural History:

After being sentenced to 360 months, Mr. Schmitt appealed. Appellate counsel Jodi Backlund argued that Mr. Huff had erred by not realizing that based on the trial court's ruling that the federal offense was not classified as a felony or a prior conviction, Mr. Schmitt's prior class B and C felony convictions had washed out between May 5, 2001 (the day after Mr. Schmitt's conviction in federal court for the bank robbery) and December 3, 2013 (the day that Mr. Schmitt was arrested on the instant offense). "Schmitt 1."

A PRP was filed and consolidated with the direct appeal. Id. The PRP was intended to supplement the record in order to ensure that the Court had the correct dates of commission and/or conviction of prior class A offenses that the state had either omitted or misstated in the judgment and sentence in this case. PRP Opening Brief Exhibits (Schmitt 1). The Response in this PRP at 14, fn. 4 again shows the need for Mr. Schmitt's first PRP. This fn. states that Mr. Schmitt's 1993 conviction for robbery 1° was committed in 1983 -- when Mr. Schmitt was just 9 years old. The Response misstates the offense date even though Mr. Schmitt -- again -- submitted the charging information for that 1993 robbery conviction with the instant PRP. Ex. L. The offense

was actually committed on April 6, 1992. Id. The PRP argued the same issues as the direct appeal, with the only difference being that Mr. Ellis argued that because Mr. Schmitt's federal offense was not comparable it was not a "crime," and therefore did not interrupt the washout period that began when Mr. Schmitt was released from DOC on August 6, 1999. Schmitt-1.

The state did not appeal the trial court ruling on Mr. Schmitt's federal offense. Id. The state advanced no argument -- at any point -- in their Response in Schmitt-1 that the trial court had erred. Id. Even so, while performing a washout review of Mr. Schmitt's prior class B and C convictions, the Court, sua sponte, determined that the scoring directive in RCW 9.94A.525(3) **does** apply to Mr. Schmitt's federal offense. Id. at 743, ¶ 7-8. This Court then **classified** Mr. Schmitt's federal offense as a class C felony after stating that RCW 9.94A.525(3) "characterizes" and "recognized" non-comparable federal offenses as a class C felony. Id. 743-744, 8-10.

Using this felony classification, the Court went on to find that: (1) being convicted of the federal offense interrupted Mr. Schmitt's washout period that had begun on August 6, 1999; and (2) Mr. Schmitt's confinement for the federal offense was "confinement pursuant to a felony conviction," which did not end until April 23, 2013 -- thereby preventing Mr. Schmitt from having the ten crime free years in the community necessary for his second strike (a 1996 rob 2°) to washout pursuant to RCW 9.94A.525(2). Id. at 744.

Clarification about the CrR 7.8 Motion and This Second PRP:

On March 22, 2018, Mr. Ellis filed a Motion to Vacate (CrR 7.8) in the Pierce County Superior Court. The motion was transferred to the this Court as a PRP on the basis that it was untimely, and this Court then transferred the CrR 7.8 Motion turned PRP to the Supreme Court as a successive petition. Because that CrR 7.8 Motion turned PRP did not adequately brief the issues for appellate review, Mr. Ellis filed a complete PRP with the Supreme Court that fully outlined the issues for review. Case No. 95931-5. The Supreme Court then transferred this actual PRP to the Court of Appeals. Case No. 52511-9-II.

Thus, as the CrR 7.8 Motion turned PRP was going up to the Supreme Court from this Court, the actual PRP filed with the Supreme Court was coming down to this Court. Mr. Ellis filed a motion asking to have them consolidated and was denied. Mr. Ellis abandoned the CrR 7.8 Motion turned PRP that was pending in the Supreme Court and focused on the actual PRP filed in this case.

Mr. Schmitt apologizes for any confusion. Mr. Schmitt's reasoning for explaining this is to clarify that he has not filed multiple motions and PRP's. Rather, there has been only the PRP consolidated with the direct appeal in Schmitt 1, and this second PRP. As Mr. Schmitt establishes below, this second PRP does not violate the successive petition ban.

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B. GROUNDS FOR RELIEF & ARGUMENT

RCW 10.73.140: This petition was filed in the Supreme Court where the restrictions of RCW 10.73.140 do not apply. In re Pers. Rest. of Johnson, 131 Wn.2d 558 , 933 P.2d 1019 (1997). Furthermore, this petition does not violate RCW 10.73.140 because the grounds for relief -- except Mr. Schmitt's claim that he was received ineffective assistance of counsel -- did not exist until November 23, 2016 when the opinion in Schmitt 1 was rendered. In re Pers. Rest. of Jeffries, 114 Wn.2d 485, 492, 789 P.2d 731 (1990) (claim was not "available" if it is based on "intervening case law" or "pertinent intervening developments."). Jeffries does not list a "significant change in the law" requirement. Id.

RAP 16.4(d): The "good cause" requirement in RCW 10.73.140 and RAP 16.4(d) are the same. In re Pers. Rest. of Holmes, 121 Wn.2d 327, 849 P.2d 1221 (1993).

Mr. Schmitt has good cause for not raising these issues in his prior consolidated appeal and PRP.

The state did not appeal from any part of the trial court ruling -- neither that the federal offense was not classified as a felony, nor that RCW 9.94A.525(3) did not apply to the federal offense. The state's Response in Schmitt 1 advanced no argument that the trial court erred. This is because all precedent supported the trial court ruling -- leaving the state nothing to argue on appeal.

The application of RCW 9.94A.525(3) to Mr. Schmitt's federal offense did not happen until the opinion in Schmitt 1 was

rendered. It would be unreasonable to expect Mr. Schmitt to seek review of an un-appealed trial court ruling where he was the prevailing party. Our review courts would grind to a halt if the parties that prevailed on issues in the trial court were then expected to re-litigate them on review without notice.

Of additional relevance is that Mr. Schmitt had no reason to think there might be any question about the trial courts ruling on classification and the application of the scoring directive in RCW 9.94A.525(3). This is so because prior to Schmitt 1, the scoring directive in RCW 9.94A.525(3) had never been applied to a federal offense that had a comparable Washington offense but that had failed the classification process. In fact, all precedent -- to include binding precedent from our Court -- held that the scoring directive in RCW 9.94A.525(3) did not apply to his federal offense. State v Farnsworth, 133 Wn. App. 1, 130 P.3d 389 (Div II 2006) (Farnsworth's 2004 and 2007 Judgment and Sentences: Ex. J; and Ex. K); State v Freeburg, 120 Wn. App. 192, 84 P.3d 292 (Div I 2004) (Freeburg's 2005 Judgment and Sentence: Ex. I); State v Mutch, 171 Wn.2d 646, 245 P.3d 803 (2011) (federal bank robbery conviction correctly excluded from trial court calculation of Mutch's offender score).

Additionally, prior to the opinion in Schmitt 1, the rules of the offender score statute had not been -- in this case -- applied contrary to the legislatures intent as determined in State v Moeurn, 170 Wn.2d 169, ___, 172 P.3d 1158 (2011).

The ends of justice are served by reviewing Mr. Schmitt's ineffective assistance of counsel claim.

Schmitt 1 reviewed this claim contrary to clearly established United States Supreme Court precedent. Thus, the ends of justice are served by allowing Mr. Schmitt to renew his claim that he received ineffective assistance of counsel. In re Pers. Rest. of Percer, 150 Wn.2d 41, 47-48, 75 P.3d 488 (2003) (the ends of justice were satisfied simply because the Court of Appeals had clearly erred in the direct appeal).

Introduction

Schmitt 1 announced two new rules of law: (1) That federal offenses which have a comparable offense under Washington law -- like robbery -- but have failed the classification process are subject to the scoring directive in RCW 9.94A.525(3); and (2) a comparability analysis that ignores the existing legal and factual analysis set for by our Court. The first new rule is contrary to precedent by our Court, Division II, and Division I (briefed below). The second new rule is prohibited by vertical stare decisis.

Even so, this case does not hinge on either of the two new rules of law announced in Schmitt 1. When reviewing Mr. Schmitt's claim that he received ineffective assistance of counsel during plea negotiations and at the time of sentencing, Schmitt 1 failed to examine the claim based on the facts and circumstances that existed on and prior to September 12, 2014.

Even if the above reasons were insufficient to grant Mr.

Schmitt relief, Schmitt 1 erred when performing the washout review of Mr. Schmitt's prior class B and C felony convictions. The provision in RCW 9.94A.525(3) that Schmitt 1 relied upon is a **scoring directive** -- it is not a **classification directive.** Scoring values do not exist until **after** prior convictions are identified and the washout is completed. See Moeurn below. Scoring values **only** apply to offender score rules 7 through 21 -- scoring values may **not** be returned to RCW 9.94A.525(2) and applied to the washout rule. Id.

I. MR. SCHMITT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS AND AT THE TIME OF SENTENCING.

Mr. Schmitt's claim that he received the ineffective assistance of counsel must be reviewed based on the facts and circumstances that existed on and prior to September 12, 2014. Strickland v.Washington, 466 US 668, 690, 104 S.Ct. 2052 (1984). Mr. Huff's sole trial strategy was to plead Mr. Schmitt guilty. Ex. N. Mr. Huff was aware of our Court's opinion in Lavery months before the mitigation packet was completed and plea negotiations began. Ex. O. Mr. Huff knew that Mr. Schmitt was seeking a plea of 15 years. Ex. P.

Mr. Huff's failure to know the law relevant to Mr. Schmitt's sentencing consequences was ineffective assistance of counsel. Mr. Huff's failure to resume plea negotiations after the trial court ruled that Mr. Schmitt's federal offense was not comparable or a prior conviction was ineffective assistance of counsel. Mr. Huff's failure's prejudiced Mr. Schmitt throughout plea

plea negotiations prior to and on September 12, 2014.

II. SCHMITT.1 APPLIED THE OFFENDER SCORE RULES CONTRARY TO THE LEGISLATURE'S INTENT WHEN PERFORMING A WASHOUT REVIEW OF MR. SCHMITT'S SECOND STRIKE.

In Mosurn our Court found that the legislature intends that the rules of the offender score statute be completed in order. Toward this end the Mosurn Court divided the offender score statute -- RCW 9.94A.525 -- into three separate steps. Step One: Identify prior convictions as directed in RCW 9.94A.525(1); Step Two: Examine prior convictions in order to determine if any washout as directed in RCW 9.94A.525(2); and Step Three: Tally the offender score as directed in RCW 9.94A.525(7) through RCW 9.94A.525(21) in order to arrive at the total offender score. Mosurn at 175.

The Response ignores Mosurn entirely. This Court can treat that as a concession. See In re Pers. Rest. of Pullman, 167 Wn.2d 205, 212 n.4, 218 P.3d (913) (2009).

When attempting to classify Mr. Schmitt's federal offense in order to identify his prior convictions as required by RCW 9.94A.525(1), a trial court correctly refers to the classifications directives found in the first two sentences of RCW 9.94A.525(3). The trial court did just that in this case. Then, after stating on record that Mr. Schmitt's federal offense was not a prior conviction, the trial court entered a written ruling in the judgment and sentence, stating: "C[our]t [d]etermines not comparable or included in prior conviction - offender score." Ex. C at 2.

When Schmitt 1 performed the washout review as required by RCW 9.94A.525(2), they impermissibly went to the scoring directive in the third sentence of RCW 9.94A.525(3), and then **returned** that scoring value to RCW 9.94A.525(2) -- which is precisely what Moeurn held was contrary to the legislatures intent with the offender score statute. The step two washout **must** be completed before scoring begins -- and scoring values **may not** be applied to the step two washout. Moeurn at 175 ("no discernible 'scoring' is to take place under [RCW 9.94A.525](2). Rather, under that portion of the statute, prior convictions are to be 'included' or excluded. **They are not to be given a value or added together.**") (emphasis added).

Even if the scoring directive in RCW 9.94A.525(3) does apply to Mr. Schmitt's federal offense, that scoring value does not exist until **after** the washout review has been completed for his prior convictions that have been identified pursuant to RCW 9.94A.525(1). A court **may not**, while performing a washout review, go to a scoring directive and then apply that scoring value to RCW 9.94A.525(2) in order to prevent the washout of prior convictions.

III. SHALL BE SCORED MAY NOT BE READ TO MEAN SHALL BE CLASSIFIED.

The Response correctly cites to State v. Bartholomew, 104 Wn.2d 844, 710 P.2d 196 (1985) in bringing to this Court's attention that "[t]he use of 'shall' in a statute indicates the legislature intended the directive to be mandatory." Response at

9, lines 2-4; Bartholomew at 848. Strangely, after emphasizing this fact to the Court, the Response still proceeds to argue that what follows "shall" in a statute should be ignored. Here, the third sentence of RCW 9.94A.525(3) says "shall be scored" not "shall be classified." That is the mandatory directive of the legislature: scoring.

This Court should accept the states acknowledgment that "shall be scored" is a mandatory directive from the legislature as a concession that it was improper for Schmitt 1 to treat this scoring directive as a classification directive.

The legislature had the ability to continue with the classification directives throughout RCW 9.94A.525(3) and chose not to. Schmitt 1 erred when reading this mandatory scoring directive to be a classification directive when the mandatory directive from the legislature clearly instructs scoring.

In the alternative "score[d]" in RCW 9.94A.525 has been rendered ambiguous.

The Response acknowledges that "shall be scored" is a mandatory directive from the legislature. Even so, the state never once tries to explain how "scored" and "classified" can be read to be the same thing. Simpson Inv. Co. v Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) ("when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.") Scored is not defined, but Moeurn has already stated that "[t]he logical inference is that 'Score[d] [...] relates to the third step." Id. at 175. A basic

principle of statutory construction provides that where words of a statute are not defined, they "must be given their ordinary meaning." United States v Granderson, 511 US 39, 71, ___ S.Ct. ___ (___).

Because Schmitt 1 has interpreted and applied the scoring directive contrary to it's application in Mutch, Farnsworth, and Freeburg, it is clear that "shall be scored" has been rendered ambiguous. The Response fails to offer any explanation for the language in this statute, and in fact ignores everything Mr. Schmitt set forth in his Opening Brief regarding how this provision should be interpreted. Mr. Schmitt, therefore, asks that this Court apply the rule of lenity and find his interpretation of "scored" to be a directive that only applies to the scoring rules found in RCW 9.94A.525(7) through RCW 9.94A.525(21).

IV. SCHMITT 1 IMPERMISSIBLY ANNOUNCES A NEW COMPARABILITY ANALYSIS WHERE A SCORING DIRECTIVE IN RCW 9.94A.525 IS USED TO CREATE FELONY CLASSIFICATION FOR A FEDERAL OFFENSE.

Schmitt 1 correctly states that when determine if a foreign offense interrupts the washout period "we first start with a comparability analysis." Id. at 742, ¶ 6. Schmitt 1 then -- inexplicably -- fails to perform the long established two part legal and factual comparability analysis used to determine if a foreign offense is classified as a Washington felony. State v Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); State v Wiley, 124 Wn.2d 679, 684, 880 P.2d 983 (1994).

Instead, Schmitt..1 observes that RCW 9.94A.525(3) "recognized" and "characterizes" Mr. Schmitt's federal offense as a class C felony. Id. at 743-744, ¶ 8 - 10. Without ever performing the required comparability analysis, Schmitt.1 finds that Mr. "Schmitt's federal bank robbery conviction is a class C felony per RCW 9.94A.525(3)." Id. at 744, ¶ 11. Schmitt.1 creates a new comparability analysis where an offender score rule defines a crime under Washington law, and doing so is prohibited.

V. THE TRIAL COURT'S FACTUAL DETERMINATION THAT MR. SCHMITT'S FEDERAL OFFENSE WAS NOT A PRIOR CONVICTION WAS VERITY ON APPEAL.

The Response argues that the trial court's ruling about Mr. Schmitt's federal offense is not a fact -- which is incorrect. The existence of a prior conviction is a fact determined by a trial court. Apprendi.v.New.Jersey, 530 US 466, 120 S.Ct. 2348 (2000); Blakely.v.Washington, 542 US 296, 124 S.Ct. 2531 (2004). The trial court entered the factual determination that Mr. Schmitt's federal offense was not a prior conviction through both an oral ruling and a written one in the judgment and sentence -- which was signed.

The state's failure to assign error to this fact (by appealing or even in their Response) renders this fact binding on appeal. State.v.Hill, 123 Wn.2d 641, 644, ___ P.__ ___ (1994).

C.-CONCLUSION-&-PRAYER-FOR-RELIEF

Mr. Schmitt asks this Court to vacate his convictions and remand for further proceedings. In the alternative, Mr. Schmitt asks this Court to order an evidentiary hearing in order for the

trial court to (1) perform a washout review of Mr. Schmitt's prior class B and C felony convictions, and (2) develop facts around what happened with trial counsel during plea negotiations and at plea and sentencing. Any further relief this Court deems just and appropriate.

Respectfully submitted this 16th day of FEBRUARY, 2022.

Jacob Ivan Schmitt
Petitioner, pro se

PRP CASE NO. 52511-9-II

EXHIBIT N

SUPERIOR COURT RECORDS CAUSE NO. 13-1-04668-9

E-FILED
IN OPEN COURT
CD2

December 04 2013 1 38 PM

Pierce County Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,	Plaintiff	No. 13-1-04668-9
vs.		
JACOB IVAN SCHMITT	Defendant	**SCHEDULING ORDER (orh)**

IT IS HEREBY ORDERED that:

The following court dates are set for the defendant:

Hearing Type	Date	Time	Courtroom
Omnibus Hearing	Fri-Jan 10, 2014	9:30 AM	315
Jury Trial	Thu-Jan 23, 2014	8:30 AM	315

The defendant shall be present at these hearings and report to the courtroom indicated at:

930 Tacoma Avenue South, County-City Building, Tacoma, Washington, 98402

DAC: Defendant will be represented by Department of Assigned Counsel.

FAILURE TO APPEAR WILL RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST.

Dated : December 4, 2013.

Electronically signed by:
/s/JAMES ORLANDO
JUDGE/COMMISSIONER

/s/ ERIN SICKLES
Attorney for Defendant, Bar# 39634

Copy Received
Defendant unable to sign:
Shackled

/s/ Claire A Vitikainen
Prosecuting Attorney, Bar #39987

13-1-04668-9 41643508 ORCTD 01-10-14

FILED
DEPT 22
IN OPEN COURT
JAN 10 2014
Pierce County Clerk
By ..... DEPUTY

WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff
vs.
Jacob Schmitt,
Defendant

Cause No. 13-1-04668-9

ORDER CONTINUING TRIAL

Case Age 37 Prior Continuances 0

This motion for continuance is brought by ☐ state ☒ defendant ☐ court.
☒ upon agreement of the parties pursuant to CrR 3.3(f)(1) or
☐ is required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his or her defense or
☐ for administrative necessity.

Reasons for the Continuance: Three Strikes case. Have been needed to prepare / review discovery / obtain + review Mitigation package to be prepared by defense for consideration by the State.

☒ *The defendant's signature below represents his/her agreement with the continuance and the new trial date and that the time period between the date of this order and the new trial date should be considered an excluded period pursuant to CrR 3.3(e)(3) and (f).*

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☒ OMNIBUS HEARING ☐ STATUS CONFERENCE HEARING ☐ TRIAL READINESS STATUS CONFERENCE ☐ _____	4-25-14	9:30am	201-A Dept 22 Hickman	
THE CURRENT TRIAL DATE OF: 1-23-14	IS CONTINUED TO: 5/15/14 @ 8:30 am Room 202 Dept 22 Hickman			

Expiration date is: 6/14/14 (Defendant's presence not required) TFT days remaining: 30

DONE IN OPEN COURT this 10th day of January, 2014.

Defendant

Judge

Attorney for Defendant/Bar # 17785

Prosecuting Attorney/Bar # 17298

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

_____ Pierce County, Washington

Interpreter/Certified/Qualified

F:\Word_Excel\Criminal Matters\Criminal Forms\Revised Order Continuing Trial 11-12-04.DOC

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff

vs.

Jacob Schmitt, Defendant

Cause No. 13-1-04668-9

ORDER CONTINUING TRIAL

Case Age 142 Prior Continuances 1

This motion for continuance is brought by ☒ state ☒ defendant ☐ court.

☒ upon agreement of the parties pursuant to CrR 3.3(f)(1) or

☐ is required in the administration of justice pursuant to CrR 3.3(f)(2)and the defendant will not be prejudiced in his or her defense or

☐ for administrative necessity.

Reasons: Negotiations ongoing. Settlement options being explored in this 3-State case. More time needed for defense to prepare mitigation materials.

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED the Defendant shall be present and report to:

	DATE	TIME	COURT ROOM	ID NUMBER
☐				
☒ OMNIBUS HEARING	5/9/14	9:30	202A	
☐ STATUS CONFERENCE HEARING				
THE CURRENT TRIAL DATE OF: 5/15/14	IS CONTINUED TO: 6/17/14 @ 8:30 am Room			

Expiration date is: _____ (Defendant's presence not required) TFT days remaining: 30

DONE IN OPEN COURT this 25th day of April, 20 14.

Jacob Schmitt
Defendant

JOHN R. HICKMAN
Judge

Attorney for Defendant/Bar # 17785

Prosecuting Attorney/Bar # 17278

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

_____ Pierce County, Washington
Interpreter/Certified/Qualified

Court Reporter _____

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

Jacob Schmitt,

Defendant.

NO. 13-1-04668-9

ORDER ON OMNIBUS HEARING
CHARGE: Robbery 1° Attempted 2nd Elude Police Officer
TRIAL DATE: 10-17-14

OOR

THIS MATTER having come before the court for an Omnibus Hearing, the State represented by: Lori Kooiman, and the defendant being present and represented by: Curtis Hutt.

1. Regarding PROSECUTOR'S OBLIGATIONS, THE DEPUTY PROSECUTING ATTORNEY STATES that at least seven days prior to this order:

[X] The Prosecutor provided to defendant a complete list of the defendant's criminal convictions.

[X] The Prosecutor has provided to defense all discovery in their possession or control, pursuant to CR 4.7(a);

[ ] The Prosecutor has contacted law enforcement agencies to request and/or obtain any additional supplemental police reports, forensic tests, and evidence and has made them available to defendant or defense counsel. The State is aware of the following reports, tests or evidence which has not been made available to the defendant: ~~Rpts~~ How-to Case, Need to Confirm DX.

[ ] Prosecutor has reviewed the discovery and criminal history and made an offer to the defense.

If prosecutor has not checked every box in this section, the court makes the following order:
3rd Smike case, Defense is giving mitigation packet hopefully to Prosecutor by 6/6/14.

2. Regarding DEFENSE ATTORNEY'S OBLIGATIONS, DEFENSE COUNSEL STATES that at least two days prior to this order:

[X] Defense attorney has met with the defendant about this case.

[ ] Defense attorney has received a plea offer from the State. Third Strike Case / Negotiations ongoing. Mitigation

[X] Defense attorney has reviewed the discovery and the criminal history.

[X] Defense attorney has given discovery to prosecutor – pending / mitigation package being prepared.

If defense attorney has not checked every box in this section, the court makes the following order:

3. Regarding DISCOVERY: The parties agree that Discovery is COMPLETE/NOT COMPLETE IN THE FOLLOWING RESPECTS: State to provide any additional discovery to defense counsel upon receipt, Some Music transcripts -

[ ] DISCOVERY must be completed by: DNR - Deemed on Rearr

4. Regarding GENERAL NATURE OF DEFENSE:

The Defense states that the general nature of the defense is:

[X] General Denial
[ ] Consent
[ ] Alibi
[ ] Diminished Capacity
[ ] Insanity
[ ] Self-defense
[X] Other (specify) Defense reserves right to assert mental defense(s).

5. Regarding CUSTODIAL STATEMENTS by defendant, the parties agree that:

[ ] No custodial statements will be offered in the State's case in chief, or in rebuttal.

[ ] The statements of defendant will be offered in the State's case in rebuttal only.

[X] The statements referred to in the State's discovery will be offered and:

[ ] May be admitted into evidence without a pre-trial hearing, by stipulation of the parties.

[X] A 3.5 conference is required and is estimated to require 2 (~~min~~/hr) and is set for day of trial.

6. Regarding PRIOR CRIMINAL CONVICTIONS OF THE DEFENDANT, the parties agree that if defendant testifies at trial:

[X] If the defendant testifies at trial, the prior record of convictions contained in the State's discovery

[ ] will [X] will not be (stipulated to) by the defendant with the following exceptions:

[ ] There are no prior known convictions at this time. State will advise defendant promptly if it learns of prior convictions.

7. Regarding SUPPRESSION OF PHYSICAL EVIDENCE OR IDENTIFICATION, the parties agree that:

[X] No motion to suppress physical evidence or identification will be filed.

Or, THE COURT ORDERS THAT:

[X] Defendant's written motion to suppress shall be filed by two wks b/4 trial. The State's response shall be filed by 3 days before trial. Testimony will/will not be required.

[ ] State's written motion to suppress shall be filed by _____. The Defendant's

response shall be filed by _____. Testimony will/will not be required.

8. Regarding OTHER PRE-TRIAL MOTIONS: No additional motions are anticipated, except:

_____

Briefing schedule: Affidavits and briefs of the moving party must be served and filed by: _____

Responsive Brief must be served and filed by: _____

The hearing will last about _____ (min/hr)

9. Regarding TRIAL

a. The trial will be [X] jury [ ] non-jury, and will last about _____ days.

b. Is an interpreter needed: [X] No [ ] Yes. Language: _____ (If an interpreter is needed, State will call interpreter services at ext. 6091

10. Regarding WITNESSES:

There will be out-of-state witnesses [ ]yes [ ]no [X] unknown at this time.

A child competency or child hearsay hearing is needed [ ]yes [X]no.

State:

[ ] All witnesses have been disclosed.

[ ] A Witness List has been filed.

[X] A witness list must be filed by: 2 weeks b/4 trial

Defense:

[ ] All witnesses have been disclosed.

[ ] A Witness List has been filed.

[X] A witness list must be filed by: 2 weeks prior to trial.

11. Other

[ ] Defendant needs a competency examination.

[ ] Defendant is applying for drug court.

[X] Defendant may be seeking an evaluation which may necessitate a continuance.

12. The Court sets a Status Conference for 6/6/14 at 9:30 am (date) for the purpose of: scheduling / check status of mitigation / settlement negotiations

13. Other orders: _____

FILED
DEPT. 22
IN OPEN COURT
MAY 09 2014
Pierce County Clerk
By _____ DEPUTY

Dated 5/9 2014.

JOHN R. HICKMAN

x _____
Defendant

_____
Judge

_____ 17785
Defendant's Attorney/Bar #

_____
Prosecuting Attorney/Bar # 30328

ORDER ON OMNIBUS HEARING - 3 (Rev. 3/08)

Z1836-3

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Jacob Schmitt, Defendant

Cause No. 13-1-04668-9

ORDER CONTINUING TRIAL

Case Age 184 Prior Continuances 2

This motion for continuance is brought by ☐ state ☒ defendant ☐ court.
☐ upon agreement of the parties pursuant to CrR 3.3(f)(1) or
☐ is required in the administration of justice pursuant to CrR 3.3(f)(2)and the defendant will not be prejudiced in his or her defense or
☐ for administrative necessity.
Reasons: More time needed to complete mitigation packet and ~~~~ psych eval

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED the Defendant shall be present and report to:

	DATE	TIME	COURT ROOM	ID NUMBER
☐				
☐ OMNIBUS HEARING				
☒ STATUS CONFERENCE HEARING	7-11-14	9:30	202A/Hickman Dept 22	
THE CURRENT TRIAL DATE OF: 6/17/14	IS CONTINUED TO: 9/30/14 @ 8:30 am Room 202A/Hickman Dept 22			

Expiration date is: 10/25/14 (Defendant's presence not required) TFT days remaining: 30

DONE IN OPEN COURT this 6th day of June, 2014.

Defendant

Judge JOHN R. HICKMAN

Attorney for Defendant/Bar # 17785

Prosecuting Attorney/Bar # 30320

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

_____ Pierce County, Washington
Interpreter/Certified/Qualified

Court Reporter _____

PRP CASE NO. 52511-9-II

EXHIBIT O : MAY 28, 2014 PRINTOUT OF LAVERY

111 P.3d 837
154 Wash.2d 249, 111 P.3d 837
(Cite as: 154 Wash.2d 249, 111 P.3d 837)

Supreme Court of Washington,
En Banc.
In re PERSONAL RESTRAINT OF Leonard B. LAVERY, Petitioner.

No. 75340-7.
Argued Nov. 9, 2004.
Decided May 5, 2005.

Background: Following appellate affirmance of his conviction of second-degree robbery and his receipt of persistent offender sentence of life imprisonment without possibility of parole, Supreme Court's dismissal, 11 P.3d 827, of his petition for review, and dismissal of his first personal restraint petition (PRP), petitioner filed PRP directly with Supreme Court.

Holdings: The Supreme Court accepted review, and, in an opinion by Chambers, J., held that:
(1) petitioner's prior conviction of federal bank robbery was not legally comparable with crime of second-degree robbery under state law for purposes of Persistent Offender Accountability Act (POAA);
(2) persistent offender sentence of life without possibility of parole was penalty beyond statutory maximum for petitioner's crime of conviction;
(3) it would decline to remand for examination of record of federal court proceedings in order to determine whether federal offense was factually comparable to offense under state law;
(4) instant PRP was not time-barred; and
(5) petitioner demonstrated good cause for consideration of second PRP.

Sentence vacated.

West Headnotes

[1] Sentencing and Punishment 350H ⇐1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases

Sentencing and Punishment 350H ⇐1380(2)

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(K) Proceedings
350Hk1375 Evidence
350Hk1380 Degree of Proof
350Hk1380(2) k. Existence and Eligibility of Prior Conviction. Most Cited Cases
Under the Persistent Offender Accountability Act (POAA), an out-of-state conviction may not be used as a strike unless the state proves by a preponderance of the evidence that the conviction would be a strike offense under the POAA. West's RCWA 9.94A.120 (2000).

[2] Sentencing and Punishment 350H ⇐1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases
To determine whether a prior out of state or federal conviction is comparable to a conviction under state law for purposes of the Persistent Offender Accountability Act (POAA), the sentencing court must compare the out of state or federal offense with the potentially comparable offenses under state law. West's RCWA 9.94A.120 (2000).

[3] Sentencing and Punishment 350H ⇐1400

350H Sentencing and Punishment
350HVI Habitual and Career Offenders

350HVI(L) Punishment
350Hk1400 k. In General. Most Cited Cases
Offender who has been convicted of two strike offenses must be sentenced to life without parole upon conviction for a third such offense, pursuant to the Persistent Offender Accountability Act (POAA). West's RCWA 9.94A.120(4) (2000).

[4] Sentencing and Punishment 350H ⚿1260

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1255 Particular Offenses
350Hk1260 k. Other Particular Offenses. Most Cited Cases
Second degree robbery is a strike offense for purposes of the Persistent Offender Accountability Act (POAA). West's RCWA 9.94A.030(23)(o) (1998).

[5] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases
Foreign convictions count as strikes, for purposes of the Persistent Offender Accountability Act (POAA), if they are comparable to a strike offense under state law. West's RCWA 9.94A.030(23)(u) (1998).

[6] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases
Defendants with equivalent prior convictions are to be treated the same way for purposes of the Persistent Offender Accountability Act (POAA), regardless of where their convictions occurred. West's RCWA 9.94A.120 (2000).

[7] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases
In determining whether foreign convictions are comparable to strike offenses under state law for purposes of the Persistent Offender Accountability Act (POAA), a sentencing court must first compare the elements of the crimes. West's RCWA 9.94A.120 (2000).

[8] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases
In cases in which the elements of a crime under state law and the foreign crime with which it is being compared for purposes of analysis under the Persistent Offender Accountability Act (POAA) are not substantially similar, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable state statute. West's RCWA 9.94A.120 (2000).

[9] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases

In determining whether foreign convictions are comparable to strike offenses under state law for purposes of the Persistent Offender Accountability Act (POAA), the elements of the out of state crime must be compared to the elements of a state criminal statute in effect when the foreign crime was committed; if the elements of the foreign conviction are comparable to the elements of a strike offense under the applicable state law on their face, the foreign crime counts toward the offender score as if it were the comparable offense under state law. West's RCWA 9.94A.120 (2000).

[10] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases

For purposes of comparison under the Persistent Offender Accountability Act (POAA), the crime of federal bank robbery is a general intent crime; the state law crime of second-degree robbery, however, requires specific intent to steal as an essential, nonstatutory element. West's RCWA 9.94A.120 (2000).

[11] Criminal Law 110 ⚿38

110 Criminal Law
110II Defenses in General
110k38 k. Compulsion or Necessity; Justification in General. Most Cited Cases

Criminal Law 110 ⚿46

110 Criminal Law
110VI Capacity to Commit and Responsibility for Crime
110k46 k. Capacity in General. Most Cited Cases

Criminal Law 110 ⚿48

110 Criminal Law
110VI Capacity to Commit and Responsibility for Crime
110k47 Insanity
110k48 k. In General. Most Cited Cases

Criminal Law 110 ⚿53

110 Criminal Law
110VI Capacity to Commit and Responsibility for Crime
110k52 Intoxication
110k53 k. In General. Most Cited Cases

Robbery 342 ⚿14

342 Robbery
342k14 k. Defenses. Most Cited Cases

For purposes of comparison under the Persistent Offender Accountability Act (POAA), among the defenses that have been recognized by state courts in robbery cases which may not be available to the general intent crime of federal bank robbery are: (1) intoxication; (2) diminished capacity; (3) duress; (4) insanity; and (5) claim of right. West's RCWA 9.94A.120 (2000).

[12] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions

350Hk1270 k. In General. Most Cited Cases

For purposes of comparison under Persistent Offender Accountability Act (POAA), defendant's prior conviction for federal bank robbery was not legally comparable with crime of second-degree robbery under state law, where elements of the two offenses were not substantially similar. West's RCWA 9.94A.120 (2000).

[13] Jury 230 ⇐34(7)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(7) k. Particular Cases in General. Most Cited Cases
(Formerly 230k34(1))

Sentencing and Punishment 350H ⇐1380(1)

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(K) Proceedings
350Hk1375 Evidence
350Hk1380 Degree of Proof
350Hk1380(1) k. In General. Most Cited Cases

For purposes of robbery defendant's *Apprendi* challenge to sentence imposed under Persistent Offender Accountability Act (POAA), life without possibility of parole was penalty beyond statutory maximum for his crime of conviction, namely, second-degree robbery. West's RCWA 9.94A.120 (2000).

[14] Sentencing and Punishment 350H ⇐1381(2)

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(K) Proceedings
350Hk1375 Evidence
350Hk1381 Sufficiency
350Hk1381(2) k. Fact of Prior Conviction or Adjudication. Most Cited Cases

All a sentencing court needs to do in order to enhance a sentence on the basis of a prior conviction is find that the prior conviction exists; no additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence.

[15] Sentencing and Punishment 350H ⇐1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases

While a sentencing court may enhance a sentence on the basis of a prior foreign conviction identical on its face to a conviction under state law on the basis of a finding that the prior conviction exists, this is not the case for foreign crimes that are not facially identical, in essence, such crimes are different crimes.

[16] Criminal Law 110 ⇐1181.5(9)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(9) k. Habitual and Second Offenders. Most Cited Cases

Supreme Court would decline to remand, in proceedings on petitioner's personal restraint petition (PRP) challenging use of prior federal bank robbery conviction to enhance his sentence for second-degree robbery under Persistent Offender Accountability Act (POAA), to permit examination of record of federal court proceedings in order to

determine whether federal offense was factually comparable to offense under state law, where federal statute was broader than state statute and petitioner may have had no incentive to attempt to prove that he did not commit narrower offense. West's RCWA 9.94A.120 (2000).

[17] Sentencing and Punishment 350H ⚿1270

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1270 k. In General. Most Cited Cases

Where the statutory elements of a foreign conviction are broader than those under a similar state statute, the foreign conviction cannot truly be said to be "comparable" for purposes of the Persistent Offender Accountability Act (POAA). West's RCWA 9.94A.120 (2000).

[18] Criminal Law 110 ⚿1586

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases

Petitioner's out-of-time personal restraint petition (PRP) was not time-barred, where significant change in law intervened between filing of first, timely PRP and filing of second; argument that federal bank robbery and robbery under state law were not comparable for purposes of Persistent Offender Accountability Act (POAA) was not meaningfully available to petitioner before intervening decision, which decision changed comparability analysis for federal bank robbery. West's RCWA 10.73.090, 10.73.100(6); RAP 16.3 – 16.15; West's RCWA 9.94A.120 (2000).

[19] Criminal Law 110 ⚿1668(1)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(1) k. In General. Most Cited Cases

Statutory prohibition against successive personal restraint petitions (PRPs) did not limit jurisdiction of Supreme Court to consider petitioner's second PRP. RCW 10.73.140.

[20] Criminal Law 110 ⚿1668(6)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(4) Excuses for Failure to Raise Issue in Previous Post-Conviction Proceeding
110k1668(6) k. Particular Issues and Cases. Most Cited Cases

Petitioner demonstrated good cause for consideration of second personal restraint petition (PRP) challenging sentence imposed upon him under Persistent Offender Accountability Act (POAA), where significant change in law intervened between filing of first and second PRPs; argument that federal bank robbery and robbery under state law were not comparable for purposes of POAA was not meaningfully available to petitioner before intervening decision, which decision changed comparability analysis for federal bank robbery. West's RCWA 10.73.090, 10.73.100(6); West's RCWA 9.94A.120 (2000); RAP 16.4(d).

[21] Criminal Law 110 ⚿1668(1)

110 Criminal Law
110XXX Post-Conviction Relief

110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(1) k. In General. Most Cited Cases

Rule barring consideration of a second post-conviction petition requesting similar relief unless the petitioner can show good cause includes personal restraint petitions (PRPs). RAP 16.4(d).

[22] **Criminal Law 110 ⇐1668(1)**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(1) k. In General. Most Cited Cases

"Good cause" for the filing of a successive post-conviction petition is shown where the petitioner demonstrates that a material intervening change in the law has occurred. RAP 16.4(d).

**839 Suzanne Lee Elliott, Seattle, for Petitioner/Appellant.

Catherine Marie McDowall, Ann Marie Summers, King County Prosecutor's Office, Seattle, for Appellee/Respondent.

Sheryl Gordon McCloud, James Elliot Lobsenz, Carney Badley Spellman, Rita Joan Griffith, Seattle, for Amicus Curiae (Washington Association of Criminal Defense Lawyers).

CHAMBERS, J.

*252 ¶ 1 Leonard B. Lavery was convicted of second degree robbery in 1998 and sentenced to life in prison under the Persistent Offender Accountability Act (POAA), former RCW 9.94A.120 (1998). At issue is whether Lavery's 1991 federal bank robbery conviction was a "strike" under the POAA. We conclude that it was not and that Lavery's Personal Restraint Petition (PRP) is not barred either as untimely or successive.

STATEMENT OF THE CASE

[1][2] ¶ 2 On July 20, 1998, Lavery was convicted for the May 1998 robbery of a Texaco convenience store in Woodinville, Washington. At sentencing, the State asserted that he was a persistent offender subject to life in prison under the POAA. The State argued that Lavery's 1991 federal bank robbery conviction was comparable to the crime of second degree robbery in Washington, a "strike" offense under the POAA. Under the POAA, an out of state conviction may not be used as a strike unless the State proves by a preponderance of the evidence that the conviction would be a strike offense under the POAA. *State v. Ford*, 137 Wash.2d 472, 479-80, 973 P.2d 452 (1999). To determine **840 whether a prior out of state or federal conviction is comparable to a Washington conviction, the sentencing court must compare the out of state or federal offense with the potentially comparable Washington offenses.

¶ 3 At sentencing, Lavery argued that his federal bank robbery conviction was not comparable to Washington's *253 second degree robbery, a strike offense under the POAA, because robbery in Washington, unlike under federal law, requires a specific intent to steal. Believing that the Court of Appeals decision in *State v. Mutch*, 87 Wash.App. 433, 942 P.2d 1018 (1997), controlled, the sentencing court found that Lavery's bank robbery conviction constituted a strike offense and sentenced him as a persistent offender to life in prison without the possibility of parole. Lavery appealed.

¶ 4 At the Court of Appeals, Lavery again argued that the federal conviction under 18 U.S.C. § 2113 was not a strike under Washington law. The court affirmed Lavery's conviction and sentence in an unpublished opinion, holding that under the POAA, as interpreted in *Mutch*, federal bank robbery and robbery under Washington law are legally

comparable. *State v. Lavery*, 100 Wash.App. 1068, 2000 WL 703790.

¶ 5 Lavery unsuccessfully filed a Petition for Review in this court, which was dismissed on October 31, 2000. *State v. Lavery*, 142 Wash.2d 1005, 11 P.3d 827 (2000). Lavery then filed a PRP in the Court of Appeals, which was dismissed on February 14, 2002.

¶ 6 Lavery's position at sentencing, on direct appeal, and in his first PRP was vindicated when, on February 19, 2004, the Court of Appeals issued its opinion in *State v. Freeburg*, 120 Wash.App. 192, 84 P.3d 292, *review denied* 152 Wash.2d 1022, 101 P.3d 108 (2004). In *Freeburg*, the Court of Appeals held that on the basis of two recent cases, *State v. Bunting*, 115 Wash.App. 135, 61 P.3d 375 (2003) and *Carter v. United States*, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000), federal bank robbery is not legally comparable to the crime of robbery in Washington. In April 2004, Lavery filed this second PRP directly in this court, claiming that the *Freeburg* decision represented a "significant change in the law." We accepted review and now vacate his sentence.

DISCUSSION

¶ 7 Given recent developments in the law, the State concedes "that the record as it currently exists is insufficient*254 to demonstrate the comparability of [Lavery's] federal conviction." State's Resp. to Pers. Restraint Pet. at 12. The State also conceded at oral argument in *Freeburg* that "federal bank robbery is not comparable to the crime of robbery in Washington." *Freeburg*, 120 Wash.App. at 199 n. 16, 84 P.3d 292. The State argues, however, that while the sentences are not comparable on their faces, a sentencing court acts properly if it looks to the record of the prior conviction to determine if defendant's conduct would have constituted a strike offense as defined in a Washington criminal statute. Under this approach, a sentencing court may be required to make findings of fact that need not have been found to convict the defendant in the prior conviction.

¶ 8 Lavery argues that the POAA is unconstitutional to the extent that it permits a sentencing judge to make findings about the underlying facts of a prior conviction based on a preponderance of the evidence. *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). He notes that the maximum sentence for second degree robbery is 84 months and if additional facts will change his punishment to life in prison without the possibility of parole, a finder of fact must determine those facts beyond a reasonable doubt. *Id.*

IS FEDERAL BANK ROBBERY A "STRIKE" OFFENSE?

[3][4][5][6] ¶ 9 We first address whether Lavery's federal conviction was properly included as a strike offense under the POAA. An offender who has been convicted of two strike offenses must be sentenced to life without parole upon conviction for a third such offense. Former RCW 9.94A.120 (4)(1998). Second degree robbery is a strike offense for purposes of the POAA. Former RCW 9.94A.030 (23)(*o*)(1998). Foreign**841 convictions count as strikes if they are comparable to a Washington strike offense. Former RCW 9.94A.030 (23)(u)(1998). Defendants with equivalent prior convictions are to be treated the same way, regardless of where their convictions occurred. *State v. Villegas*, 72 Wash.App. 34, 38–39, 863 P.2d 560 (1993).

[7][8] *255 ¶ 10 In determining whether foreign convictions are comparable to Washington strike offenses, we have devised a two part test for comparability. *State v. Morley*, 134 Wash.2d 588, 952 P.2d 167 (1998). In *Morley*, we determined that for the purposes of determining the comparability of crimes, the court must first compare the elements of the crimes. *Morley*, 134 Wash.2d at 605–06, 952 P.2d 167. In cases in which the elements of the Washington crime and the foreign crime are not substantially similar, we have held that the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a

comparable Washington statute. *Morley*, 134 Wash.2d at 606, 952 P.2d 167. However, "[w]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial." *Id.*

LEGAL COMPARABILITY

[9] ¶ 11 To determine if a foreign crime is comparable to a Washington offense, the sentencing court must first look to the elements of the crime. *Morley*, 134 Wash.2d at 605–06, 952 P.2d 167. More specifically, the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. *Id.* at 606, 952 P.2d 167. If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense. *Id.*

[10][11][12] ¶ 12 The crime of federal bank robbery is a general intent crime. *Carter*, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203. The crime of second degree robbery in Washington, however, requires specific intent to steal as an essential, nonstatutory element. *See State v. Kjorsvik*, 117 Wash.2d 93, 98, 812 P.2d 86 (1991) ("our settled *256 case law is clear that 'intent to steal' *is* an essential element of the crime of robbery.") (citing *State v. Hicks*, 102 Wash.2d 182, 184, 683 P.2d 186 (1984)). Its definition is therefore narrower than the federal crime's definition. Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication, *see State v. Boyd*, 21 Wash.App. 465, 586 P.2d 878 (1978); (2) diminished capacity, *see State v. Thamert*, 45 Wash.App. 143, 723 P.2d 1204 (1986); (3) duress, *see State v. Davis*, 27 Wash.App. 498, 618 P.2d 1034 (1980); (4) insanity, *see State v. Tyler*, 77 Wash.2d 726, 466 P.2d 120 (1970), *vacated in part on other grounds*, 408 U.S. 937, 92 S.Ct. 2865, 33 L.Ed.2d 756 (1972); and (5) claim of right, *see Hicks*, 102 Wash.2d 182, 683 P.2d 186. Because the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, we conclude that federal bank robbery and second degree robbery in Washington are not legally comparable.

FACTUAL COMPARABILITY

[13] ¶ 13 In *Apprendi*, the United States Supreme Court held that *except for a prior conviction*, a "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. Life without possibility of parole is a penalty beyond the statutory maximum for the crime of second degree robbery.

[14][15] ¶ 14 In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. *See* **842 *State v. Smith*, 150 Wash.2d 135, 141–43, 75 P.3d 934 (2003); *accord Almendarez–Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). All a sentencing court needs to do is find that the prior conviction exists. *State v. Wheeler*, 145 Wash.2d 116, 121, 34 P.3d 799 (2001). No *257 additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence. *Smith*, 150 Wash.2d at 143, 75 P.3d 934. While this is also true of foreign crimes that are identical on their face, it is not true for foreign crimes that are *not* facially identical. In essence, such crimes are *different* crimes.

[16] ¶ 15 The State asks us to remand this case to the sentencing court so that it may examine the underlying facts of Lavery's federal robbery conviction to determine if his 1991 offense was factually

comparable to Washington's second degree robbery. Where the foreign statute is broader than Washington's, that examination may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense. *See, e.g., State v. Ortega*, 120 Wash.App. 165, 84 P.3d 935 (2004).

¶ 16 In *Ortega*, Jose Ortega pleaded guilty to first degree child molestation. *Ortega*, 120 Wash.App. at 168, 84 P.3d 935. The State sought to have him sentenced to life in prison without the possibility of parole under the POAA. *Id.* To do so, the sentencing judge would have had to conclude that a 1991 Texas conviction for indecency with a child in the second degree was comparable to a Washington strike offense. *Id.* at 169, 84 P.3d 935. The most similar crime in Washington required the child to be (1) under the age of 12, (2) not the defendant's spouse, and (3) more than 36 months younger than the perpetrator. *Id.* at 168, 84 P.3d 935. However, the Texas statute criminalized contact with children under the age of 17. *Id.* at 172, 84 P.3d 935. Ortega had not admitted or stipulated to the age of the child in Texas. *Id.* Further, even if the child in the Texas case had claimed to be 11, Ortega would have had no incentive to challenge and prove that the child was actually 12 at the time of the contact. The critical fact in the Texas proceeding was that the child was under 17. Ortega would have been just as guilty of the Texas crime if the child had been 12, 13 or even 16, and therefore, had no reason to contest the child's actual age.

[17] ***258** ¶ 17 Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

¶ 18 As in *Ortega*, Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution. Furthermore, Lavery neither admitted nor stipulated to facts which established specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction. We conclude that Lavery's 1991 foreign robbery conviction is neither factually nor legally comparable to Washington's second degree robbery and therefore not a strike under the POAA.

SIGNIFICANT CHANGE IN THE LAW

¶ 19 Because this is not Lavery's first PRP, and was filed more than one year after his conviction and sentence was final, Lavery must first show that his PRP is not time-barred or barred as successive. *See* RCW 10.73.090; RAP 16.3 – 16.15. Since the applicable exception to both the time bar and bar against successive petitions hinges on whether *Freeburg* represents a change in the law, we address that question.

¶ 20 "[W]here an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a 'significant change in the law....' " *In re Pers. Restraint of Greening*, 141 Wash.2d 687, 697, 9 P.3d 206 (2000). "One test to determine whether an [intervening case] represents a significant change in the ****843** law is whether the defendant could have argued this issue before publication***259** of the decision." *In re Pers. Restraint of Stoudmire*, 145 Wash.2d 258, 264, 36 P.3d 1005 (2002).

¶ 21 The argument that federal bank robbery and robbery in Washington are not comparable was not meaningfully available to Lavery before *Freeburg*. *Freeburg* changed the comparability analysis for robbery. In *Mutch*, the defendant's federal bank robbery indictment had charged him with entering a bank and taking money from a teller using " 'force, violence, and intimidation.' " *Mutch*, 87 Wash.App. at 438, 942 P.2d 1018. The *Mutch* court determined that despite the fact that the "use of force" require-

ment under the federal statute was broader than under the state statute, the language in the indictment was sufficient to meet the definition of the more narrow state statute. *Id.* at 437, 942 P.2d 1018. Because the federal indictment in Lavery's case contained nearly identical language, the Court of Appeals reasoned that *Mutch* controlled the comparability of the crimes *as a matter of law*. Thus, until *Freeburg* synthesized both *Bunting* and *Carter* and declared that the crimes are not necessarily comparable, the rule in Washington was that federal bank robbery and second degree robbery were comparable as a matter of law.

¶ 22 The *Mutch* court engaged in the comparability analysis endorsed by this court in *Morley*, 134 Wash.2d 588, 952 P.2d 167. The *Mutch* court, however, blurred the distinction between legal and factual comparability by ostensibly holding that where an indictment for federal bank robbery contains language similar to the language of which the *Mutch* court approved, the inquiry into comparability should cease. *Morley* stood for no such proposition. The legal and factual determinations are to be done separately. It is clear on their faces that federal bank robbery and robbery under Washington law are not legally comparable, and this was not confirmed until *Freeburg* effectively overruled *Mutch* in this regard.

¶ 23 In *Carter*, the United States Supreme Court upheld a defendant's conviction for federal bank robbery under 18 U.S.C. § 2113(a) by holding that the statute required only proof of general intent with respect to the actus reus of the *260 crime. The Court rejected the defendant's assertion that the statute required him to have the specific intent to steal. *Carter*, 530 U.S. at 268, 120 S.Ct. 2159.

¶ 24 In *Bunting*, a defendant was being sentenced under the POAA. One of his prior strike offenses was a conviction for robbery in Illinois. The court noted that while the allegedly comparable Washington crime, second degree robbery, required the nonstatutory element of "intent to steal," the Illinois crime had only a general intent requirement. The *Bunting* court held that the crimes were not legally comparable. *Bunting*, 105 Wash.App. at 141, 61 P.3d 375.

¶ 25 In *Freeburg*, Scott Freeburg was sentenced to life in prison without the possibility of parole under the POAA. *Freeburg*, 120 Wash.App. at 194, 84 P.3d 292. At sentencing, the sentencing court found that a prior federal bank robbery conviction was comparable to second degree robbery and was a strike under the POAA. *Id.* at 197, 84 P.3d 292. After examining *Carter* and *Bunting*, the Court of Appeals correctly concluded that the elements of the two crimes were not legally comparable and ordered Freeburg to be resentenced. *Id.* at 194, 84 P.3d 292.

¶ 26 Because *Freeburg* effectively corrected the error of the *Mutch* analysis, it represents a material change in the law. The *Freeburg* court disposed of the defendant's claim in precisely the same fashion advocated by Lavery in his direct appeal. Before *Freeburg*, however, that argument was unavailable to Lavery as it had been foreclosed by *Mutch*. Thus, *Freeburg* represents a significant change in the law. Under *Freeburg*, Lavery's federal bank robbery conviction was not necessarily a strike offense and he, therefore, may not have been properly sentenced to life in prison without parole.

[18] ¶ 27 Generally, a PRP filed more than one year after judgment and sentence are final is barred. RCW 10.73.090(1). In cases in which there has been a "significant change in the law" that is "material" to the conviction and sentence, however, the one **844 year time limit does not apply. RCW 10.73.100(6). Because *Freeburg* represents a significant*261 change in the law that was material to Lavery's sentence, we hold that his PRP is not time barred.

[19][20][21][22] ¶ 28 The State asserts that this petition is barred as successive. "The prohibition on successive PRPs found in RCW 10.73.140 limits the jurisdiction of the Court of Appeals but does not limit this court's jurisdiction." *Stoudmire*, 145

Wash.2d at 202–63, 36 P.3d 1005 (footnotes omitted) (citing *In re Pers. Restraint of Johnson*, 131 Wash.2d 558, 565, 933 P.2d 1019 (1997)). RAP 16.4(d), however, bars consideration of a second petition requesting "similar relief" unless the petitioner can show good cause. *Stoudmire*, 145 Wash.2d at 203, 36 P.3d 1005. This bar includes PRPs. *In re Pers. Restraint of Becker*, 143 Wash.2d 491, 496, 20 P.3d 409 (2001). "Good cause" is shown where the petitioner demonstrates that a material intervening change in the law has occurred. *In re Pers. Restraint of Jeffries*, 114 Wash.2d 485, 488, 789 P.2d 731 (1990).

¶ 29 Because we find that *Freeburg* represents a material intervening change in the law, we hold that Lavery has shown good cause, and that his PRP is not barred as successive.

APPOINTMENT OF COUNSEL

¶ 30 Lavery also moves for an order allowing him to pursue this petition at public expense. While we compliment Lavery's counsel, Suzanne Elliot, for her efforts in this case, the motion for appointment of counsel at public expense is denied.

CONCLUSION

¶ 31 Lavery's sentence under the POAA was predicated on his federal conviction for bank robbery. Because the federal crime does not require the element of "specific intent to steal," it is broader than second degree robbery in Washington and, therefore, not legally comparable. Additionally, the crimes are not factually comparable since the ***262** record of the 1991 federal conviction does not establish that Lavery admitted or stipulated to having the specific intent to steal, nor was it proved that he possessed such an intent. Since the crimes are not legally or factually comparable to a "strike" offense under the POAA, the federal bank robbery conviction was erroneously counted as a "strike" against Lavery for sentencing purposes.

¶ 32 We vacate Lavery's sentence and order that he be resentenced for the crime of second degree robbery.

WE CONCUR: ALEXANDER, C.J., and C. JOHNSON, MADSEN, SANDERS, BRIDGE, OWENS, FAIRHURST, JJ., and IRELAND, J. Pro Tem.

Wash.,2005.
In re Personal Restraint of Lavery
154 Wash.2d 249, 111 P.3d 837

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PRP CASE NO. 52511-P-IT

EXHIBIT P

SEPTEMBER 10, 2014 PRINTOUT WITH NOTATION:

"WE ASKED FOR 15 YRS."

Stip. p 4 # VI
strike "asked for" – Leave "agreed."
he asked for 15 yrs.

RCW 9.94A.030
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.

(2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

(3) "Commission" means the sentencing guidelines commission.

(4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.

(6) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.

(7) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.

(8) "Confinement" means total or partial confinement.

(9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

(10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

(11) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

INMATE

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